Airborne Freight Corp. v. St. Paul Fire & Marine Ins. Co., 04-35989

WALLACE, Circuit Judge, dissenting:

The majority makes a strong argument that there are material facts in dispute as to whether USPS was a covered agent of Airborne, and whether Airborne retained responsibility and liability for packages once they had been handed off to the USPS. However, I would not reach the issue. Even though ambiguities in deductible clauses are construed in favor of the insured, *see Witherspoon v. St. Paul Fire & Marine Ins. Co.*, 548 P.2d 302, 308 (Wash. 1976), I am persuaded that under Washington law the deductible in the policy should have been applied on a per-package basis. I would therefore affirm the summary judgment.

"To determine the parties' intent, the court first will view the contract as a whole, examining its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their respective interpretations." *Transcon. Ins. Co. v. Wash. Pub. Utilities Dist. Utility Sys.*, 760 P.2d 337, 340 (Wash. 1988) (en banc). The consistent four-year historical practice of the parties was to apply a deductible to each individual claim of a cargo loss. An individual loss was never treated as anything but a separate claim involving a separate deductible. A former representative of Airborne conceded during a

deposition that if each of the individual claims had been filed rather than as lumped together in a lawsuit, they would "absolutely" have been subject to individual deductibles.

Similarly, each of the 3,538 NFI lost claims was submitted individually to Airborne. NFI created a 98-page document listing all of the lost or damaged packages. There was no "common cause" involving all of the damaged or missing packages. Under Washington law, there were multiple occurrences, each giving rise to its own claim. *See Greengo v. Pub. Employees Mut. Ins. Co.*, 959 P.2d 657, 663-64 (Wash. 1998) (en banc) ("Where there were two collisions, we look to see if each has its own proximate cause. If so then there are two accidents"); *Transcon.*, 760 P.2d at 345 ("We are persuaded by [the] contention that the number of triggering events depends on the number of causes underlying the alleged damage and resulting liability").

The majority concludes that the plain meaning of "claim" is a "demand for compensation," and accordingly that each lawsuit, which combined thousands of individual claims, was a single "claim" for the purposes of the insurance policy. This leads to absurd results. A company in Airborne's position, under the majority's approach, may simply refuse to pay any individual claims that are under

the deductible amount until a comprehensive lawsuit is filed, thereby triggering insurance coverage that it would not have secured otherwise. I do not think that this is what the Washington law or the parties intended. I respectfully dissent.